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To: Microsoft Comment
Date: 1/25/02 5:27pm
Subject: Microsoft Settlement

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The following proposal is intended as a public comment on the Proposed Final Judgement under the Tunney Act.

Executive summary

The Justice Department's proposed antitrust settlement with Microsoft seems to demand that Microsoft do more to open up its application programming interfaces (APIs) to commercial competitors. A more effective remedy would be one that required Microsoft to standardize and publicize the entire set of Windows APIs and the file formats of its Office applications with the express goal of allowing all competitors, including non-commercial developers, to build Windows software applications and operating systems that compete with Microsoft on a level field.

Proposal

The Justice Department's proposed antitrust settlement with Microsoft seems to demand that Microsoft do more to open up its APIs to competitors. This addresses the main technical advantage that Microsoft weilds as a monopoly; that many of the Windows APIs and Office applications file formats are hidden, undocumented, or changed at will. This leaves consumers locked into Microsoft's control because their applications cannot be run in a competing environment, and their information cannot be accessed with competing applications. But the fine print makes it clear that Microsoft could pretty much continue with business as usual. No requirement is given for complete disclosure of the Windows APIs and Office file formats. If Microsoft is given the means to withhold portions of these interfaces from competition, then it's monopoly position remains unaltered.

A more effective remedy would be one that required Microsoft to standardize and publicize the entire set of Windows APIs and the file formats of its Office applications with the express goal of allowing competitors to build Windows software applications, and operating systems, that compete with Microsoft on a level field. This should be a public disclosure and not limited to a few Microsoft selected developers. It needs to include all developers

so that true competition may be revived.

The remedies in the Proposed Final Judgement specifically protect companies in commerce, organizations in business for profit. On the surface, that makes sense because Microsoft was found guilty of monopolistic activities against "competing" commercial software vendors like Netscape, and other commercial vendors like computer vendor Compaq, for example. The Department of Justice is used to working in this kind of economic world, and has attempted to craft a remedy that will rein in Microsoft without causing undue harm to the rest of the commercial portion of the industry. But Microsoft's greatest competition on the operating system front comes from Linux -- a non-commercial product -- and it faces increasing competition on the applications front from Open Source and freeware applications.

The biggest competitor to Microsoft Internet Information Server is Apache, which comes from the Apache Foundation, a not-for-profit. Apache supports a significant portion of the World-Wide-Web, along with Sendmail and Perl, both of which also come from non-profits. Yet not-for-profit organizations have no rights at all under the proposed settlement. Section III(J)(2) contains some very strong language against not-for-profits. Specifically, the language says that it need not describe nor license API, Documentation, or Communications Protocols affecting authentication and authorization to companies that don't meet Microsoft's criteria as a business: "... (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, ..."

The settlement gives Microsoft the right to select it's competition and effectively kill other products, like Open Source projects that use Microsoft calls.

Section III(D) takes this disturbing trend even further. It deals with disclosure of information regarding the APIs for incorporating non-Microsoft "middleware." In this section, Microsoft discloses to Independent Software Vendors (ISVs), Independent Hardware Vendors (IHVs), Internet Access Providers (IAPs), Internet Content Providers (ICPs), and Original Equipment Manufacturers (OEMs) the information needed to inter-operate with Windows at this level. Yet, when we look in the footnotes at the legal definitions for these outfits, we find the definitions specify commercial concerns only.

Under this deal, the government is shut out, too. NASA, the national laboratories, the military, the National Institute of Standards and Technology, even the Department of Justice itself, have no rights.

Clearly the disclosure of APIs and file formats must be public

and available to the entire software industry. Such a plan would require careful oversight and enforcement, since Microsoft could easily engage in all manner of foot-dragging. If Microsoft set out to be uncooperative, it could release the API information slowly, in deliberately confusing ways, or assiduously following the letter of the court's order while flagrantly violating its spirit. (There's precedent here: This is precisely how Microsoft behaved during the trial when it told the court that it would supply a version of Windows with Internet Explorer removed from its guts, but gee, sorry, then Windows wouldn't work.)

Remember that Microsoft is in court as a repeat offender; the current antitrust suit, in which a federal district court and an appeals court have both affirmed that Microsoft is a monopoly and that it has abused its monopoly powers, arose out of the failure of a previous consent-decree settlement of an earlier antitrust case. At some point, having repeatedly violated the law, Microsoft needs to pay a price, or it will continue with its profitably anticompetitive ways.

There's no reason to think the Justice Department's proposed settlement will work any better than the consent decree of last decade did. And financial penalties can hardly wound a company that has a cash reserve of billions of dollars. But intellectual property -- that's something Bill Gates and his team really care about. Requiring them to divulge some of it in order to restore competition in the software market might actually get them to change the way they operate.

With Microsoft's APIs and file formats fully standardized, documented and published, other software vendors could compete fairly -- which, after all, is what antitrust laws are supposed to promote. We might then be faced with a welcome but long unfamiliar sight: a healthy software market, driven, as today's hardware market is, by genuine competition.

Portions of this proposal contain text authored by columnists Scott Rosenberg and Robert X. Cringely.

Regards,
Robert N. Brauer